

UNITED STATES OF AMERICA,)	CASE NO. 8:11CR76
)	
Plaintiff,)	
)	
vs.)	MEMORANDUM
)	AND ORDER
PIMENIO VELA HERRERA,)	
)	
Defendant.)	

Magistrate Judge Thomas D. Thalken considered the government's motion for a joint trial (8:11CR43, Filing No. 135; 8:11CR76, Filing No. 37). In 8:11CR76, the Defendant, Pimenio Vela Herrera, is charged in a one-count Indictment with conspiring to manufacture or attempting to manufacture actual methamphetamine from on or about September 2009, through on or about September 24, 2010. In 8:11CR43, five defendants are charged with an identical conspiracy as well as with possessing pseudoephedrine with intent to manufacture actual methamphetamine. The conspiracy in both cases is the same, and Herrera could have been charged with the individuals charged in 8:11CR43. The government moved for a joint trial. Judge Thalken held a telephone hearing with respect to the motion. Herrera objects to the order granting a joint trial.

Herrera argues the Court cannot properly instruct the jury to consider each defendant's guilt or innocence independently, limit any statement made by Juanita Herrera by exclusion or redaction to avoid issues under *Bruton v. United States*, 391 U.S. 123

(1968),¹ and therefore the evidence at the hearing before Judge Thalken was insufficient to support granting the motion.

Initially, the Court notes that it appears the hearing before Judge Thalken was limited to oral argument, as the record contains no evidence. Also, because the hearing was held telephonically this Court does not have a transcript to review.

Under 28 U.S.C. § 636(b)(1)(A) and NECrimR 59.2, the Court has reviewed the order from which this appeal has been taken. A district court may set aside any part of the magistrate judge's order shown to be clearly erroneous or contrary to law. 28 U.S.C. § 636(b)(1)(A).

In light of Eighth Circuit Model Jury Instruction 2.14 (Evidence Admitted Against Only One Defendant), Herrera's argument regarding the Court's inability to instruct the jury to consider evidence with respect to each defendant independently is misplaced.

Based on the record available, the Court does not find Herrera's argument regarding potential *Bruton* issues persuasive. Apparently the parties disagree regarding the existence of *Bruton* issues, and the Court does not have the benefit of reviewing any discussion on this subject that may have occurred before Judge Thalken. From the discussion in Herrera's objections and brief, it appears that redaction of the statement in question is, at least, possible.

¹The government argued initially that no *Bruton* issues exist. (Filing No. 38, at 2.)

Therefore,

IT IS ORDERED:

1. The Defendant's objections to the Magistrate Judge's order (Filing No. 41) are denied; and
2. The Magistrate Judge's order (Filing No. 40) with respect to the joint trial in cases 8:11CR43 and 8:11CR76 is affirmed.

DATED this 20th day of September, 2011.

BY THE COURT:

s/Laurie Smith Camp
United States District Judge